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**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

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Vet. App. No. 15-4618

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OSCAR P. BATTLE  
Appellant,

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,  
Appellee.

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BRIEF FOR APPELLANT

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Tina L. Lucas  
P.O. Box 2334  
Glen Burnie, MD 21060  
(410) 318-9146

Counsel for Appellant

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v.	)	Vet. App. No. 15-4618
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ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

**BRIEF OF THE APPELLANT**

Pursuant to U.S. Vet. App. R. 28 and 31, Oscar P. Battle, (Appellant) respectfully submits to the United States Court of Appeals for Veterans Claims (Court or CAVC) the initial Brief of the Appellant stating that there are errors of law contained within the Department of Veterans' Affairs (DVA, VARO or VA) decision of October 30, 2015. In that decision, the Board of Veterans' Appeals (Board or BVA), denied entitlement to service connection for a gastrointestinal disorder (claimed as a “stomach” condition), to include diverticulitis. In support of his position, Appellant relies on the information contained within the Record Before the Agency (RBA or R.) as filed with the Court and the following Brief of the Appellant.

## **STATEMENT OF THE ISSUES**

- I. Whether the Board decision of October 30, 2015, was clearly erroneous and unsupported by adequate reasons and bases as to its determination that the medical examinations upon which it relied was adequate to facilitate judicial review.

## **STATEMENT OF THE CASE**

### **A. Jurisdiction**

This Honorable Court has jurisdiction to review the October 30, 2015, Board decision under the authority of 38 U.S.C. § 7252(a).

### **B. Nature of the Case**

The appellant appeals the October 30, 2015, decision of the Board of Veterans' Appeals ("Board" or "BVA") that denied his claim of entitlement to service connection for a gastrointestinal disorder (claimed as a "stomach" condition), to include diverticulitis.<sup>1</sup> On appeal, Mr. Battle submits that the Court should reverse the Board's finding that the evidence of record does not demonstrate that the Veteran has a gastrointestinal disorder that began in or was caused by military service; hold the Board failed to provide an adequate statement of reasons and bases in violation of 38 U.S.C. § 7104 (d)(1), vacate the Board's decision, and remand for readjudication.

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<sup>1</sup> Diverticulitis is a digestive disease in which pouches within the large bowel wall become inflamed. Symptoms typically include lower abdominal pain of a sudden onset.

### **C. Pertinent Facts**

Mr. Battle served honorably on active military service from July 1966 to July 1970. **(RBA at 167)**. Service treatment records show in June 1970, Mr. Battle complained of stomach complaints lasting approximately two weeks. He described pain on the right and above the umbilicus. The impression was functional bowel disease. Mr. Battle was instructed to take Metamucil and drink water. He was scheduled for an upper GI series. **(RBA. 178 (169-217))**. Mr. Battle was seen on two additional occasions for stomach complaints. Hiatal hernia symptoms were noted. **(RBA. 169-217)**. Upon discharge, it was noted he had a history of indigestion. An upper GI examination is not of record.

In June 1997, Mr. Battle reported bloody bowel movements. Following a collapse, he was taken to an emergency room and a colonoscopy revealed extensive right-sided diverticular disease with possible blood and stool in one of the diverticular. **(RBA. 367-381)**. Subsequent records show hospitalization and treatment for gastrointestinal bleeding secondary to diverticulosis. **(RBA. 321-332)**.

Private treatment records from James McGrath, M.D., refer to Mr. Battle's treatment for diverticulosis and GI bleeding beginning in July 1997. **(RBA. 771 (742-787))**. He was placed on a high fiber diet.

In May 2011, Mr. Battle sought service connection for a "stomach condition." **(RBA. 363)**. In support, he submitted records from 1997 to the present, showing his diverticulosis and GI bleeding, which he classified as a "stomach condition."

In June 2011, Mr. Battle was provided a VA C&P examination for stomach, duodenum and peritoneal. **(RBA. 341-350)**. The VA examiner opined that Mr. Battle did not have a diagnosis of any stomach issue/condition. Therefore, his claimed stomach condition was not caused by active duty military service.

In September 2013, private physician James Partridge, M.D., provided his medical opinion. He stated “according to the notes provided I would not think there is any connection, the notes mention more about hiatal hernia there is no testing that would suggest that diverticulosis was ever a diagnosis that was entertained much less tested for.” **(RBA. 232)**.

In October 2015, the VA denied Mr. Battle’s claim for a stomach condition. **(RBA. 2-13)**. The Board stated that based on the two negative nexus opinions, service connection wasn’t warranted. The Board determined that Mr. Battle’s current diagnosed diverticulitis and duodenal ulcer were not related to service. He timely appealed the decision.

### **SUMMARY OF THE ARGUMENT**

The Appellant argues that the Board committed remandable error when it relied upon two inadequate opinions. Mainly, the Board decision of October 30, 2015, failed to provide an adequate statement of reasons and bases for its determination that Mr. Battle does not have a gastrointestinal disorder that was the result of military service in violation of 38 U.S.C. § 7104 (d)(1). Also, the Board failed to give a sympathetic reading to Mr. Battle’s claim. A remand for an adequate statement of reasons or bases is the appropriate remedy.



## ARGUMENT

### **I. WHETHER THE BOARD DECISION OF OCTOBER 30, 2015, WAS CLEARLY ERRONEOUS AND UNSUPPORTED BY ADEQUATE REASONS AND BASES AS TO WHY THE MEDICAL OPINIONS WERE DEEMED ADEQUATE AND MUST BE REVERSED.**

#### **A. Standard of Review**

A determination regarding service connection or the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet. App. 67, 72 (1996); *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994); *Lovelace v. Derwinski*, 1 Vet.App. 73, 74 (1990). The Board's answer to either question is subject to review under the clearly erroneous standard. *Lennox v. Principi*, 353 F.3d 941,945 (Fed.Cir. 2003); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert at 52* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948)).

The clearly erroneous standard of review also applies to the Board's application of the evidentiary "benefit-of-the-doubt standard set forth in 38 U.S.C. § 5107(b). Under 38 U.S.C. § 5107 (b), the preponderance of the evidence must be against the claim for benefits to be denied." *Padgett v. Nicholson*, 19 Vet. App. 133, 146 (2005), *withdrawn on other grounds*, 19 Vet. App. 334 (2005), *reversed and remanded*, 473 F.3d 1164 (Fed. Cir. 2007), *reinstated*, 22 Vet. App. 159 (2008). When there is an approximate balance

of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102. To deny a claim on its merits, the evidence must preponderate against the claim. *Aleman v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

In the present matter, reversal is required because the Board's finding that the evidence of record does not demonstrate that Mr. Battle has a gastrointestinal disorder that began in or was caused by military service is clearly erroneous.

#### **B. Inadequate examination**

The examiner was asked to identify all stomach conditions found to be present. With respect to each such disorder found, the examiner should opine whether it is at least as likely as not related to the Veteran's military service. **(RBA 358-359)**. Mr. Battle has a diagnosis of diverticulitis and duodenal ulcer, which he describes as a stomach condition. The VA examiner opined that Mr. Battle does not have a diagnosed stomach condition. The evidence that Mr. Battle suffers from diverticulitis and duodenal ulcer is overwhelming. However, this condition involves the colon and not the stomach. Therefore, the VA examiner limited his examination and did not adequately discuss whether Mr. Battle's current diagnosed disability was incurred in or the result of military service. The Board relied on this opinion to deny the claim.

The Board also relied on the private medical opinion of James Partridge, M.D. **(RBA. 232)**. Dr. Partridge did not indicate a complete review of the claims folder. Also, Dr. Partridge's opinion provided no detailed rationale for his opinion. *See Nieves-*

*Rodriguez*, 22 Vet.App. at 301 (“[T]he probative value of medical opinion evidence is based on,” *inter alia*, “the physician’s knowledge and skill in analyzing the data.”) (citing *Guerrieri v. Brown*, 4 Vet.App. 467, 470-71 (1993)). This Court has determined that relying on an inadequate examination is remandable error. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (holding that an inadequate medical examination frustrates judicial review). Thus, the Board’s finding that the evidence of record does not demonstrate that the Veteran has a current gastrointestinal disorder that began in or was caused by military service was clearly erroneous.

### **C. Failure to Properly Adjudicate the Claim**

The U.S. Court of Appeals for the Federal Circuit has made clear on a number of occasions that the VA “has a duty to fully and sympathetically develop a veteran’s claim to its optimum.” Therefore, the VA must give a sympathetic reading to Mr. Battle’s claim. Mr. Battle believed that his diagnosed diverticulitis is a condition involving his stomach. As such, he filed a claim for entitlement to service connection for a stomach condition. The Board denied his claim after the examiner determined that Mr. Battle did not have a stomach condition, since diverticulitis is a condition involving the colon and not the stomach.

The Board was required to develop his claim based on the evidence of record. Instead, the Board failed to determine that Mr. Battle’s claim for a stomach condition was actually a claim for diverticulitis. Mr. Battle as a lay person is not qualified to provide a diagnosis of his current disability. A diagnosis of a current disability must be made by a medical professional or some other person with specialized knowledge, education,

experience, or training that qualifies the person to give a diagnosis. *Espiritu v. Derwinski*, 2 Vet.App. 492,295 (1992). Therefore, Mr. Battle's claim should not be denied based on his mistaken belief that diverticulitis is a stomach condition. Mr. Battle's service treatment records show complaints of stomach pain. He also experienced indigestion in service. No upper GI was performed to confirm his diagnosis at that time. Since discharge, he has been diagnosed with diverticulitis and duodenal ulcer. As such, the Board's conclusion that Mr. Battle does not have a disability that began in or was the result of service is clearly erroneous.

#### **D. Inadequate reasons and bases**

Moreover, Board decisions must include a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." *Sanders v. Principi*, 17 Vet. App. 232, 235 (2003) (citing 38 U.S.C. § 7104(d)(1)); *Simmons v. Principi*, 17 Vet. App. 104, 111 (2003). Compliance with this mandate requires "clear analysis and succinct but complete explanations. A bare conclusory statement . . . is neither helpful to the veteran, nor clear enough to permit effective judicial review[.]" *Simmons*, 17 Vet. App. at 115 (quoting *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990)) (internal quotation marks omitted). The Board must consider all applicable laws and regulations. 38 U.S.C. § 7104(a). An inadequate statement necessitates remand for further adjudication. *Kay v. Principi*, 16 Vet. App. 529, 532 (2002).

Without an adequate statement of why the Board relied on the two inadequate nexus opinions, the Board did not provide enough information for the Appellant or the

Court to understand the basis for its decision. An expert opinion that describes specific facts in Mr. Battle's medical history that support his diagnosed current disability is more persuasive than one that does not. It should contain more than the examiner reviewed the claims folder, but describe pertinent facts in the medical history and provide a sound analysis of how the facts led to the conclusion. Here, one examination states that Mr. Battle does not have a diagnosed stomach condition, while the other opinion lacks any detailed rationale for its opinion. The Board failed to adequately explain the probative value of the medical opinions.

For these reasons, the Board's reasons-or-bases statement is inadequate, section 7104(d)(1) compels the Board to adequately explain its findings so the Court can "understand and evaluate the proceedings as part of its review.") (quoting S. Rep. No. 100-418, at 37-38 (1988)); *Dalton v. Nicholson*, 21 Vet. App. 23, 35 (2007) ("Whether the B[oard's] ultimate conclusions are correct or not, . . . the incomplete nature of the decision below does not permit proper review by this Court.") (quoting *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991)).

## **CONCLUSION**

For the foregoing reasons, Mr. Battle requests that the Board's October 2015 decision be reversed or otherwise set aside and remanded for proper adjudication consistent with applicable law.

June 16, 2016

Respectfully submitted,

/s/ Tina L. Lucas  
P.O. Box 2334  
Glen Burnie, MD 21060  
410-318-9146  
Counsel for Appellant